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Third report on responsibility of international organizations*

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I. Introduction

1. On the topic "Responsibility of international organizations" the International Law Commission provisionally adopted draft articles 1 to 3 in 2003 and 4 to 7 in 2004. The latter articles deal with attribution of conduct to international organizations.[1] I reiterate the suggestion that I made in my previous report[2] that the draft articles adopted be reconsidered by the Commission before the end of the first reading in the light of comments made by States and international organizations.

2. As I mentioned in my second report,[3] a certain number of international organizations provided comments and materials in response to a request made by the Legal Counsel of the United Nations following a recommendation by the Commission during its 2002 session. These materials are now collected in document A/CN.4/545. Unfortunately, little material has so far been added following the invitation addressed by the General Assembly, in paragraph 5 of its resolution 58/77 of 9 December 2003, to "States and international organizations to submit information concerning their practice relevant to the topic 'Responsibility of international organizations'".

3. The great variety of international organizations and the fact that available practice is limited make the Commission's task difficult. There is the risk for the Commission of embarking on discussions that may seem mainly theoretical. However, the present topic is certainly not devoid of practical significance. Time alone will not remedy the situation. Progress in the Commission's work should encourage States and international organizations to express further comments and disclose relevant practice. Meanwhile, views that States and international organizations express, albeit briefly, on the questions raised by the Commission[4] provide useful guidance.

4. Like the two previous reports, the present report follows the general pattern of the articles on responsibility of States for internationally wrongful acts.[5] It considers matters that were examined with regard to States in chapters III and IV of part one of those articles. Thus, following the second report, which dealt with questions of attribution of conduct to international organizations, the present report discusses, first, the existence of a breach of an international obligation on the part of an international organization and, second, the responsibility of an international organization in connection with the act of a State or another organization.

II. Breach of an international obligation on the part of an international organization

5. The four articles on responsibility of States for internationally wrongful acts that are included in the chapter on the breach of an international obligation[6] deal with, respectively, the existence of a breach of an international obligation, the requirement that the obligation be in force at the time the act occurs, the extension of the breach in time and the breach consisting of a composite act. All four articles are of a general nature and appear to reflect principles that are clearly applicable to the breach of an international obligation on the part of any subject of international law. For instance, when article 13 says that an "act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs", it expresses with regard to States a rule that

could be written in a similar way with regard to the breach of an international obligation on the part of any subject of international law other than a State. Thus, the statement would be equally correct if one replaced the term "State" with the term "international organization". The same reasoning may be applied to the other three articles.

6. There would be little reason for the Commission to take a different approach with regard to international organizations on the issues dealt with in the four articles on responsibility of States concerning the breach of an international obligation. This applies also to the wording of the rules set out in these articles, which should therefore remain identical, apart from replacing the reference to States with a reference to international organizations.

7. The above conclusion does not imply that further questions should not be considered with regard to the breach of international obligations on the part of international organizations, whether or not it is advisable to draft additional texts. These questions may either be specific to international organizations or be of particular relevance in regard to them.

8. As indicated in draft article 3, the wrongful act of an international organization may consist in an action or in an omission. Clearly, omissions are wrongful when an international organization is required to take some positive action and fails to do so. Compliance with this type of obligation may prove difficult for an international organization when action presupposes that a certain majority is reached within a political organ of the organization. The General Counsel of the International Monetary Fund (IMF) thus voiced this concern in a letter to the Secretary of the Commission:

> "The inclusion of 'omissions' along with 'actions' that would trigger the organization's responsibility may also lead to some problems that were not necessarily applicable when dealing with responsibility of States. Such omissions may result from the application of the organization's decision-making process under its constitutive instrument. Would an organization be responsible for not taking action, if this non-action is the result of the lawful exercise of their powers by its member States?"[7]

9. However, difficulties with compliance due to the political decision-making process are not the prerogative of international organizations. Moreover, similar difficulties may arise also when what is required is an omission. It would in any event be strange to assume that international organizations could not possess obligations to take positive actions: there are certainly many examples of treaties concluded by international organizations that provide for that type of obligation.[8]

10. The same type of obligation may well exist for an international organization also under a rule of general international law. As an example, one may take the failure on the part of the United Nations to prevent genocide in Rwanda.[9] Assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide,[10] and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.

11. Another question needs to be raised, in relation to organizations such as the European Community or the European Union that are empowered to conclude with non-member States treaties whose implementation is left to authorities of member States.

12. According to the European Union:

> "The special situation of the European Community and other potentially similar organizations could be accommodated in the draft articles by special rules of attribution of conduct, so that the actions of organs of member States could be attributed to the organization, by special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member States were the prime actors of a breach of an obligation borne by the organization, or by a special exception or saving clause for organizations such as the European Community."[11]

This approach has been endorsed by a World Trade Organization (WTO) panel. In *European Communities — Protection of Trademarks and Geographical Indication for Agricultural Products and Foodstuffs*, the panel:

> "accepted the European Communities' explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'".[12]

Should one follow the same approach, the conduct of member States would have to be attributed to the European Community even if this did not follow from the general rules on attribution, since member States cannot be said to put one of their organs at the Community's disposal for that purpose.[13] Member States are generally free to provide for implementation in the way they prefer, through State organs that remain under the State's control.

13. There are alternative ways of considering the implementation by States of treaties that are concluded by an organization of which they are members. These ways do not involve questions of attribution but rather raise issues relating to the content of the obligation breached. First, the organization may be under an obligation to take the necessary steps to ensure a certain conduct on the part of its member States. In this case, the conduct of member States would not per se be wrongful under the treaty; it would only be the occasion for the organization to comply with its obligation or fail to do so.[14] The member States' conduct may be in breach of a different obligation. As was stated in the commentary on the articles on State responsibility in the relations between States:

> "a State may be required by its own international obligations to prevent conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus the basis of responsibility in the *Corfu Channel* case was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility was original and not derived from the wrongfulness of the conduct of any other State."[15]

The organization could be in a position similar to that of Albania.

14. A second possible explanation is that the obligation for the international organization concerns the achievement of a certain result, irrespective of which entity takes the conduct that is necessary to this end. Thus, for example, the European Community could be under an obligation to reach a result which may be attained by member States; under the rules of the organization, member States may even be the only competent entities to do so. This possibility was acknowledged by the European Court of Justice in the case *Parliament v. Council* with regard to a treaty establishing cooperation that was concluded by the European Community and its member States, on the one part, and several non-member States, on the other part. The Court found that:

> "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[16]

With regard to agreements that are concluded with non-member States by the European Community alone, the reason for the Community to take up obligations of the type now under consideration is that, while member States do not acquire any obligation towards non-member States under those agreements, they have a duty to ensure compliance as a matter of Community law. As was stated by the Court of Justice in *Demirel*:

> "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the performance of the agreement."[17]

15. It does not appear necessary to specify in the draft articles the possible existence of the types of obligation referred to in the preceding paragraphs, no more than it was thought necessary to express this in the articles on State responsibility. Clearly, States often are under an obligation to invigilate the conduct of individuals or other entities. States may also have an obligation to ensure that a certain result is achieved. The passage of the judgment in *Parliament v. Council*[16] considered both the European Community and its member States. The case of the breach of an obligation to achieve a certain result appears to imply the possibility of an exception to the general principle, which was stated in draft article 3, that an internationally wrongful act presupposes an organization's wrongful conduct. However, general principles are not stated as non-derogable rules. An additional reason for not addressing in a specific provision of the draft articles the case of an obligation to achieve a certain result is that this case is of practical relevance only for a limited number of international organizations: mainly those, such as the European Community, in which member States are required to implement obligations that the organization acquires towards non-member States and in which, therefore, compliance with obligations existing for the organization may be ensured through the rules of the organization.

16. The present draft articles consider only breaches of obligations that are imposed on international organizations by international law. While it is clear that those obligations may include obligations with regard to member States and agents,[18] the question may be raised as to whether obligations under the rules of the organization pertain to international law.

17. The definition of "rules of the organization" was given in draft article 4 for the purpose of the general rule on attribution of conduct. As was stated in the commentary to that article, the relevance of the definition also for other provisions indicates that, at a later stage of first reading, the definition should be moved to draft article 2, which concerns the "Use of terms".[19] Given the specific purpose of draft article 4, it was not necessary to discuss at that stage the question of whether rules of the organization had to be regarded as part of international law. Should they not be so considered, they would in any event be relevant according to international law because of a reference made by the general rule on attribution of conduct.

18. The question of the legal nature of the rules of the organization is controversial. One view is that those rules are part of international law because they are based on a treaty or another instrument governed by international law.[20] This view was reflected in statements made by France and the Russian Federation in the Sixth Committee of the General Assembly.[21] The Legal Counsel of the World Intellectual Property Organization (WIPO) held a similar opinion:

> "the relations between an international organization and its member States and between an international organization and its agents should be more generally governed by international law, an integral part of which is the rules of the organization."[22]

19. Several authors hold a different view. While they accept that the rules of the organization find their origin in an instrument governed by international law, they maintain that the internal system of the organization is separate from international law and bears resemblance to the internal law of a State.[23] This would entail that the present draft articles should not cover breaches of obligations under the rules of the organization. While this view was not specifically endorsed in the discussion in the Sixth Committee, suggestions were made to the effect that the draft articles should not consider breaches of obligations that an organization has towards its agents[24] and, in one statement, also those towards its member States.[25] However, these suggestions may only have the purpose of limiting the scope of the draft articles, because they appear to cover also obligations that an international organization may have towards its agents and its member States under rules that do not pertain to the rules of the organization: for instance, obligations under rules of general international law concerning human rights.

20. At first sight, the second view may find support in a statement by the International Court of Justice in its opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, in which the Court said:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[26]

However, while the Court did not refer also to rules of the organization other than its constitutive instrument, the focus of attention was not put on any of these rules. When the Court considered resolutions of the Security Council, as in the *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie*, the obligations under a resolution were regarded as prevailing over obligations under a treaty and at least implicitly as having the same nature as obligations under international law.[27] Thus,

one may conclude that, according to the International Court of Justice, rules of the organization are part of international law at least insofar as the United Nations is concerned.

21. It may well be that the legal nature of the rules of the organization depends on the organization concerned. Thus, while in most organizations the relevant rules are still linked with their origin in an international instrument, some organizations may have given rise to a system of law which is distinct from international law. As a model of the latter type of organization one could cite the European Community, for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[28]

22. If one takes this approach, the draft articles could start from the premise that their scope includes breaches of obligations under the rules of the organization to the extent that these rules have kept the character of rules of international law. Although it may appear superfluous to state that the breach of an international obligation may concern an obligation set by the rules of the organization, a specification to this effect would serve some useful purpose, given the paramount importance that rules of the organization have in the life of any organization. One could thus add a paragraph to the first draft article concerning the breach of obligations. However, the wording of the paragraph should be flexible enough to allow exceptions with regard to those organizations whose rules can no longer be regarded as part of international law.

23. Rules of an organization, whether or not they are regarded as part of international law, may devise specific treatment of breaches of obligations, including with regard to the question of the existence of a breach. A proviso for the existence of special rules will have to be included in the draft articles. However, a final provision covering all aspects may be adequate for that purpose.

24. On the basis of the foregoing remarks, four draft articles should consider the breach of an international obligation. The following wording is suggested:

Article 8
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. The preceding paragraph also applies in principle to the breach of an obligation set by a rule of the organization.

Article 9
International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 11
Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

III. Responsibility of an international organization in connection with the act of a State or another organization

25. Chapter IV of part one of the draft articles on responsibility of States for internationally wrongful acts envisages certain instances in which a State is held responsible for conduct attributable to another State.[29] In that chapter, articles 16 to 18 consider cases in which a State "aids or assists" or "directs and controls another State in the commission of an internationally wrongful act", or else "coerces another State to commit an act [that] would, but for the coercion, be an internationally wrongful act of the coerced State". Responsibility of the State that aids or assists, directs and controls, or coerces another State is conditional on the knowledge of the circumstances of the internationally wrongful act. A further condition for responsibility is that both States are bound by the obligation breached. The latter condition is not stated with regard to the coercing State.

26. Although the articles on responsibility of States do not expressly envisage that States aid or assist, or direct and control, or coerce an international organization in the commission of an internationally wrongful act, these cases appear to be analogous to those referred to in the above-mentioned articles.[30] Even if the present draft, as stated in article 1, paragraph 2, also applies to "the international responsibility of a State for the internationally wrongful act of an international organization",[31] it seems unnecessary to include in the draft a provision to the effect of extending the scope of articles 16 to 18 on responsibility of States for the purpose of covering cases in which the entity which is assisted or aided, directed and controlled, or coerced by a State is not another State, but an international organization. This extension can easily be reached by the use of analogy from the articles concerning responsibility of States. It is preferable to leave to a further analysis, which will be specifically devoted to the problem of the international responsibility of States for the conduct of an organization of which they are members,[32] the question of whether the cases envisaged in the said articles also include that of States acting as members within an international organization.[33]

27. The present draft articles need to consider cases in which it is an international organization that assists or aids, directs and controls, or coerces another organization or a State in the commission of an internationally wrongful act. There would be no reason for distinguishing, for the purposes of international responsibility, between the case, for instance, of a State aiding another State and that of an organization aiding another organization or a State in the commission of an internationally wrongful act.[34] The same generally goes for the instance of direction and control and for the case of coercion. This remark appears to prompt the adoption of texts that are similar to those included in the articles on responsibility of States. As was noted in the previous section of the present report with regard to the breach of an international obligation, there would be little reason for changing the wording of the articles adopted on responsibility of States, apart from replacing the reference to a State that would be internationally responsible with a reference to an international organization. The same should apply to the provision in the articles on State responsibility (article 19) to the effect that the chapter now under consideration is "without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State". Here again, one would have to replace the reference to States with a reference to international organizations.

28. There is little practice relating to the international responsibility of international organizations in this type of case. However, one cannot consider that cases in which responsibility may arise for an international organization under sets of circumstances corresponding to those envisaged with regard to States are wholly unlikely. For instance, an international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals.[35] Assuming that the Kosovo Force (KFOR) is an international organization, an example of an organization's direction and control in the commission of allegedly wrongful acts was envisaged by the French Government in its preliminary objections in *Legality of Use of Force (Yugoslavia v. France)*, when it argued in relation to KFOR:

> "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[36]

A hypothetical example of coercion would be that of an international financial organization imposing strict conditions for an essential loan and thereby coercing the recipient State to infringe obligations towards another State or certain individuals. The General Counsel of IMF referred in a letter to the Office of Legal Affairs of the United Nations to

> "reports that the IMF was named as a defendant in a lawsuit commenced by a trade union organization in Romania which complained that the IMF imposed economic policies that impoverished Romanians".[37]

29. Practice shows a large variety of cases which raise the question of the responsibility of an international organization for conduct held by its members. These cases do not seem to fall squarely into any of the three categories covered by articles 16 to 18 on State responsibility.

30. When an international organization is entitled to take decisions that bind member States, implementation of the decision on the part of member States may result in a wrongful act. Should the member States be given discretion so that they may comply with the decision without breaching an international obligation, the organization could not be held responsible.[38] This probably explains why, in relation to a claim for reimbursement of cargo handling expenses incurred by a company during the inspection of a ship that was conducted at Djibouti during the arms embargo on Somalia, the Assistant Secretary-General, Department of Peacekeeping Operations, held that:

> "The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo."[39]

31. A different scenario would exist if the mandated conduct necessarily implied the commission of a wrongful act. In this case the organization's responsibility would also be involved. As was said in a statement by Denmark on benalf of the five Nordic countries:

> "it appeared essential to find the point where the member State could be said to have so little 'room for manoeuvre' that it would seem unreasonable to make it solely responsible for certain conduct".[40]

The possible existence of the organization's responsibility appears to hinge on whether the organization's binding decision actually requires the wrongful act to be done, or whether the act is just one of the ways that a member State may select when implementing the decision.[41]

32. The application of the above criterion to a given case may prove difficult. The pending *Bosphorus* case before the European Court of Human Rights may provide an illustration. This case arises from the impounding of an aircraft by Irish authorities in compliance with a European Community (EC) regulation implementing a Security Council resolution. The Irish Government contended that it was simply acting as an agent of European Community and, indirectly, of the United Nations, while the applicant maintained that the defendant State retained in the manner in which it applied its EC obligations a certain human rights discretion and liberty to act accordingly, and that implementation could have included more convention-consistent measures, such as compensation. In its decision on the

admissibility of the application, the European Court postponed a decision on the question:

> "The Court must ... consider whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of Article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation. However the Court is of the view that it does not have significant information to enable it to make a ruling."[42]

33. It is noteworthy that in this decision the European Court of Human Rights only envisaged exoneration from responsibility for the State concerned and did not address the question of the responsibility of an international organization. This was clearly due to the Court's lack of jurisdiction *ratione personae* in respect of any entity other than a State party to the European Convention on Human Rights. The same reason also prevented the European Commission of Human Rights from considering the responsibility of the European Community in *M. & Co. v. Germany*,[43] and the European Court of Human Rights from doing the same in *Cantoni v. France*,[44] in *Matthews v. United Kingdom*[45] and in *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*.[46] The Human Rights Committee similarly declared that a communication concerning conduct of the European Patent Office was inadmissible, because it could not,

> "in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto".[47]

A further case in which the allegedly wrongful conduct was mandated by an international organization, but the organization's responsibility is unlikely to be examined, is given by proceedings pending before the Council of the International Civil Aviation Organization over noise standards for aircraft. The Council is not entitled to address the issue of the European Community's responsibility, although the member States against which the claim is brought are merely implementing an EC regulation.[48]

34. Questions of responsibility of the European Community for conduct held by member States were discussed by the European Court of Justice. However, its decisions on that point are not very significant for present purposes, because the analysis was conducted exclusively under EC law and tended to pinpoint liability on one entity only: the entity which in the given case was regarded as having caused, by the use of its discretion, the wrongful act. Thus, in *Krohn v. Commission* the European Court of Justice found that:

> "the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to the Bundesanstalt, which was bound to comply with the Commission's instructions, but to the Commission itself".[49]

In a passage of the judgment of the Court of First instance in *Dorsch Consult v. Council and Commission*, a similar approach was taken, also with regard to the relations between the European Community and the United Nations. The Court said:

> "the alleged damage cannot, in the final analysis, be attributed to Regulation No. 2340/90, but must, as the Council has in fact contended, be attributed to

> United Nations Security Council Resolution No. 661 (1990) which imposed the embargo on trade with Iraq".[50]

The only effect of this judgment was to exonerate the European Community from liability under EC law.

35. While the issue of the responsibility of an international organization for conduct that the organization requires from its member States has not been examined by the judicial or other bodies in any of the several cases mentioned in the previous paragraphs, the question is clearly important and needs to be addressed here. One possible solution is that the international organization be regarded as responsible because it directs and controls a member State in the commission of a wrongful act. The concept of control would then have to be widened so as to encompass "normative" control.[51] This would not tally with what the Commission held in its commentary on article 17 on State responsibility, when the wording "directs and controls" is understood as referring to factual control. The Commission then said:

> "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."[52]

There may be cases in which the organization's power to bind member States through its decisions is accompanied by elements that ensure enforcement of those decisions, so that normative control would correspond in substance to factual control. However, this could not be regarded as a feature characterizing all the organizations that have the power to bind member States.

36. Be it as it may, there is one essential element that makes it difficult to accept the solution that responsibility of an international organization for conduct that member States are bound to hold because of an organization's decision depends on direction and control. According to article 17 on State responsibility, conduct is required to be wrongful both for the organization which directs and controls and for the organization and State whose conduct is directed and controlled. This second condition would exclude responsibility for the event of an organization using its power of binding member States for circumventing one of its international obligations. The organization could do so by requiring member States that are not bound by the obligation to hold a certain conduct that the organization could not lawfully take. As was said by the delegation of Austria, "an international organization should not be allowed to escape responsibility by 'outsourcing' its actors."[53]

This implies that the international organization should be held responsible if the act that would be wrongful if committed by the organization directly was in fact committed by a member State on the basis of the organization's binding decision. The fact of being able to require member States to take a certain act would otherwise put the organization in a position to achieve indirectly what is directly prohibited.

37. When an organization binds a member State to take a certain conduct in order to circumvent compliance with an international obligation, the requirement of the

knowledge of the circumstances of the internationally wrongful act, which is likewise set in article 17 on State responsibility, does not seem relevant.

38. What applies to the relations between an international organization and its member States is clearly valid also for the case in which an organization has the power to bind another organization which is a member of the former organization.

39. Only binding decisions have been considered so far. It is now necessary to discuss whether an organization could also be held responsible when it authorizes or recommends conduct on the part of a member State or organization.[54] It is true that when a recommendation or authorization is addressed to a member State, that State is not bound and therefore is free not to take the authorized or recommended conduct. However, there may be circumstances in which the responsibility of the organization should nevertheless be regarded as involved.

40. There is one first distinction to be made An authorization could be given to a member State for allowing it to pursue its own interests. One could take as an example the supply of freon gas to Iraq which was authorized by the sanctions Committee, under Security Council resolution 661 (1990) as amended by resolution 687 (1991). That supply was alleged to constitute for the exporting State a violation of the Montreal Protocol on Substances that Deplete the Ozone Layer.[55] Clearly, the supply reflected only the exporting State's and Iraq's interests, not those of the organization. It could not involve the responsibility of the United Nations.

41. Should the authorization or recommendation be made in the pursuance of one of the organization's interests, the organization would be to a certain extent involved. Although member States were not bound, some kind of positive reaction on their part would be expected by the organization. Member States responding to the organization's recommendation or authorization would be pursuing one of the organization's interests. This is not to say that the authorized or recommended conduct would always entail the organization's responsibility. This would depend on the character of the recommended or authorized conduct. Responsibility would be justified only if the recommended or authorized act was actually taken and would have been in breach of an obligation for the organization had the organization taken it directly. The possibility that member States could breach another international obligation while taking the required or recommended conduct would not per se be relevant to the organization's responsibility. In other words, the organization's responsibility would depend on the extent to which it was involved in the act.[56]

42. The foregoing conclusion would lead to the addition of a slight qualification to the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda:

> "insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'."[57]

What is assumed here is that the authorized conduct does not involve any breach of an international obligation on the part of the organization. The same qualification would apply to what the Secretary-General wrote in his report on the financing of United Nations peacekeeping operations:

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation."[58]

43. The situation of an international organization imposing a certain conduct is not identical with that of an organization authorizing or recommending that conduct. The Legal Counsel of WIPO stated that:

> "in the event a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law. The degree of responsibility of the organization should be much less if the State's wrongful conduct was only authorized, but not requested, by the organization."[59]

It is similarly clear that, when assistance in the commission of a wrongful act entails an organization's responsibility, the amount of assistance may vary, and this would affect the degree of responsibility. However, since the degree of responsibility concerns the content of responsibility, but not its existence, the question should be examined at a later stage of the present study.

44. The foregoing considerations lead one to suggest that, apart from four articles that correspond to articles 16 to 19 on State responsibility, a further article should be drafted, in order to cover cases in which responsibility of an international organization is involved because it would otherwise circumvent an international obligation by requesting member States to take a certain conduct which the organization would be forbidden to take directly. The following draft articles are suggested:

Article 12
Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) that organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 13
Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) that organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 14
Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

Article 15
Effect of the preceding articles

Articles 12 to 14 are without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Article 16
Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if:

(a) it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly; and

(b) the act in question is committed.

2. An international organization incurs international responsibility if it authorizes a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly, or if it recommends such an act, provided that:

(a) the act fulfils an interest of the same organization; and

(b) the act in question is committed.

3. The preceding paragraphs apply also when the member State or international organization does not act in breach of one of its international obligations and therefore does not incur international responsibility.

Notes

[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sect. C, para. 71.

[2] A/CN.4/541, para. 1.

[3] Ibid., para. 2.

[4] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. II, sect. B, para. 25, for the questions concerning the subject matter of the present report.

[5] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 76.

[6] Ibid., articles 12 to 15.

[7] See A/CN.4/545, sect. II.D.

[8] The possibility that a wrongful act of the European Community may consist in an omission was underlined by A. Conze, *Die völkerrechtliche Haftung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1987), p. 56.

[9] Failure to respond to genocide in Rwanda by United Nations organs was pointed out in the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (S/1999/1257, enclosure), sect. III.5. For a similar evaluation of the events relating to the fall of Srebrenica, see the report of the Secretary-General pursuant to General Assembly resolution 53/35 (A/54/549), sect. XI.

[10] United Nations, *Treaty Series*, vol. 78, p. 277.

[11] A/C.6/59/SR.21, para. 18. The same view was expressed by P. J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review*, vol. 1 (2004), p. 111 at p. 127.

[12] WT/DS174. The complaint had been lodged by the United States of America.

[13] With regard to the implementation of treaties concluded by the European Community, P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 385, noted that in practice it was generally difficult to hold that State authorities acted as agents for the Community.

[14] For the view that, when implementation of a treaty concluded by an organization rests with its member States, attribution of responsibility to the organization is not necessarily based on attribution of the conduct of State organs to the organization, see, also for references, C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 255.

[15] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, pp. 151-152, para. 4.

[16] Judgment of 2 March 1994, Case C-316/91, *European Court Reports* (1994), p. I-625 at pp. I-660-661 (recital 29). As had been held by C. Tomuschat, "Liability for Mixed Agreements", in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements* (Deventer: Kluwer, 1983), p. 125 at p. 130, "even in the case of a mixed agreement acceptance will normally make every contracting party a member with full rights and obligations over the whole breadth of the agreement. The Community and its Member States are thus jointly responsible for the implementation of mixed agreements".

[17] Judgment of 30 September 1987, Case 12/86, *European Court Reports* (1987), p. 3719 at p. 3751 (recital 11).

[18] This point was stressed in the statements by China (A/C.6/59/SR.21, para. 41), Belgium (A/C.6/59/SR.22, paras. 74-75), Cuba (A/C.6/SR.23, para. 25) and Mexico (ibid., para. 27).

[19] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), p. 109, para. 14.

[20] The theory that considers that the "rules of the organization" are part of international law has been expounded particularly by M. Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962) and G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des cours de l'Académie de Droit international de La Haye*, vol. 127 (1969-II), p. 1. For a recent reassertion see P. Daillier and A. Pellet, *Droit international public*, 7th ed. (Paris: Librairie générale de Droit et de Jurisprudence, 2002), pp. 576-577.

[21] Statements by France (A/C.6/59/SR.22, para. 11) and the Russian Federation (A/C.6/59/SR.23, para. 23).

[22] Unpublished letter, dated 19 January 2005, addressed to the Legal Counsel of the United Nations.

[23] Among the authors that defend this view: L. Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire français de droit international*, vol. 3 (1957), p. 314, P. Cahier, "Le droit interne des organisations internationales", *Revue générale de droit international public*, vol. 67 (1963), p. 563, and J. A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 179 (1993-I), p. 145 at pp. 222-225. The distinction between international law and the internal law of international organizations was upheld also by R. Bernhardt, "Qualifikation und Anwendungsbereich des internes Rechts internationaler Organisationen", *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

[24] Statements by Austria (A/C.6/59/SR.22, para. 22), Belgium (ibid., para. 73) and Greece (A/C.6/59/SR.23, para. 42).

[25] Statement by Singapore (A/C.6/59/SR.22, para. 56).

[26] *ICJ Reports 1980*, p. 73 at pp. 89-90, para. 37.

[27] *ICJ Reports 1992*, p. 114 at p. 126, para. 42. The order referred to a resolution of the Security Council in the following terms:

> "whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention".

[28] Judgment of 15 July 1964, Case 6/64, *European Court Reports* (1964), p. 585.

[29] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 76.

[30] P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. (see footnote 13 above), pp. 468-469.

[31] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sec. C, para. 71.

[32] This will be the fourth report on responsibility of international organizations.

[33] This issue was recently discussed by M. C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Leiden diss., 2004), pp. 102-103.

[34] The report entitled "Accountability of International Organizations" which was presented to the Berlin Conference (2004) of the International Law Association included the following proposition:

> "There is also an internationally wrongful act of an international organization when it aids or assists a State or another international organization in the commission of an internationally wrongful act by that State or organization"

(*International Organizations Law Review*, vol. 1 (2004), p. 221 at p. 258).

[35] I. F. I. Shihata, "Human Rights, Development and International Financial Institutions", *American University Journal of International Law and Policy*, vol. 8 (1992-1993), p. 27, considered the different case of a loan which is not directly targeted to a project involving an infringement of human rights when he held that "[a] loan agreement to a country which violates such rights does not in itself violate any human rights rule, or for that matter, condone violations of such rights".

[36] Preliminary Objections, p. 33, para. 45. A similar view with regard to the relations between the North Atlantic Treaty Organization and KFOR was held by A. Pellet, "*L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres*", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague/London/New York: Kluwer Law International, 2002), p. 193 at p. 199.

[37] A/CN.4/545, sect. II.I. As an annex to the letter relates, in April 2002 "the Court of Appeal of Bucharest declined its competence".

[38] This would be a case in which "the international organization's request had not called for the wrongful conduct in which the member State had engaged" (statement by the Russian Federation, A/C.6/59/SR. 23, para. 23). The statement by France (A/C.6/59/SR.22, para. 13) referred to "how much latitude the State was allowed by the organization's request". The International Law Association (ILA) report entitled "Accountability of International Organizations" (see footnote 34, p. 261) includes the following comment:

> "There will be separate responsibility of a Member State for an act of implementation of a lawful measure of an international organization if the State in the process of implementation violates rules of international law incumbent on it."

[39] *United Nations Juridical Yearbook* (1995), p. 464 at p. 465. The search had been carried out by United States and Djibouti authorities and had not led to the discovery of any prohibited goods.

[40] A/C.6/59/SR.22, para. 66. The ILA report entitled "Accountability of International Organizations" (see footnote 34, p. 261) says

> "There will be separate responsibility of a Member State for an act of implementation of a lawful measure of an international organization if the State in the process of implementation violates rules of international law incumbent on it."

[41] J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), p. 427 at p. 441, and P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. (see footnote 13 above), p. 386, held that an organization would not incur responsibility if the member State implemented an organization's decision according to its own instructions and control. D. Frank, *Verantwortlichkeit für die Verletzung der Europäischen Menschenrechtskonvention durch internationale Organisationen* (Basel: Helbing & Lichtenhahn, 1999), p. 275, gave weight to the element of discretion that member States may possess in implementing an organization's binding decision. Also according to T. Stein, "Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague/London/New York: Kluwer Law International, 2002), p. 181 at p. 184, when an "organization directs or 'orders' its members to implement a decision of the organization [the] crucial factor ... for determining responsibility for the implementing act is the measure of discretion left to the members". Looking at the issue

from the point of view of the responsibility of member States, M. Hirsch, *The Responsibility of International Organizations towards Third Parties. Some Basic Principles* (Dordrecht/London: Nijhoff, 1995), p. 87, and F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), p. 120, also emphasize the criterion of discretion.

[42] Fourth Section, Decision as to the admissibility of Application no. 45036/98, 13 September 2001. The summary of the argument of the parties is taken from the text of the decision. For the view that the *Bosphorus* case mainly involves the way in which the defendant State implemented a Community measure, see G. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général" (2000), *Annuaire français de droit international*, vol. 46 (2000), p. 614 at pp. 619-620.

[43] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[44] Judgment of 15 November 1996, *Reports of Judgments and Decisions* (1996-V) p. 1614. The case concerned the alleged violation of the principle that only the law can define a crime (*nullum crimen sine lege*) by a French statute implementing an EC directive. The directive did not require the imposition of penalties. In any event, the Court found that the principle had not been infringed.

[45] Judgment of 18 February 1999, *Reports of Judgments and Decisions* (1999-I), p. 251. The Court found that the relevant instrument was not "a 'normal' act of the Community, but ... a treaty within the Community legal order" (p. 266, para. 33). The Court also observed (p. 265, para. 32) that "acts of the EC as such cannot be challenged before Court because the EC is not a Contracting Party".

[46] Grand Chamber, decision of 10 March 2004, unpublished.

[47] Decision of 8 April 1987, Communication No. 217/1986, *H.v.d.P. v. Netherlands*, A/42/40, p. 185 at p. 186, para. 3.2.

[48] See "Oral Statements and comments on the US response", presented on 15 November 2000 on behalf of the member States of the European Union, A/CN.4/545, attachment No. 18.

[49] Judgment of 26 February 1986, Case 175/84, *European Court Reports* (1986), p. 753 at p. 768, para. 23. The approach of the European Court of Justice in apportioning liability either to the European Community or to a member State, but not to both even when there are reasons for holding responsibility to be concurrent, was underlined by M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", *Revue générale de droit international public*, vol. 92 (1988), p. 63 at p. 89.

[50] Judgment of 28 April 1998, Case T-184/95, *European Court Reports* (1998-II), p. 667 at p. 694, para. 73.

[51] According to the statement by the European Union (A/C.6/59/SR.21, para. 19), "it would be more relevant to the specific situation of the European Community to think in terms of effective legal control". For the view that the EC has "final control" ("control último") of member States' coast guards in relation to fisheries, see F. J. Carrera Hernández, *Política pesquera y responsabilidad internacional de la Comunidad europea* (Salamanca: Ediciones Universidad de Salamanca, 1995), p. 198.

[52] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 164.

[53] A/C.6/59/SR.22, para. 24.

[54] The idea that an organization could be responsible also for conduct of a member State which is simply authorized was supported in the statements by China (A/C.6/59/SR.21, para. 43), Singapore (A/C.6/59/SR.22, para. 58), Austria (ibid., para. 24), Belarus (ibid., para. 44), Spain (ibid., para. 50), Denmark, on behalf of the five Nordic countries (ibid., para. 66), New Zealand (A/C.6/59/SR.23, para. 11) and Mexico (ibid., para. 27).

[55] *United Nations Juridical Yearbook* (1994), pp. 500-501.

[56] The importance of circumstances was underlined in the statements by Italy (A/C.6/59/SR.21, para. 32), Japan (ibid., para. 57), United Kingdom of Great Britain and Northern Ireland (A/C.6/59/SR.22, para. 33), Denmark, on behalf of the five Nordic countries (ibid., para. 66) and Cuba (A/C.6/59/SR.23, para. 25).

[57] Unpublished letter.

[58] A/51/389, para. 17.

[59] See footnote 22 above. A similar view had been expressed in the statements of China (A/C.6/59/SR.21, para. 43) and Belarus (A/C.6/59/SR.22, para. 44).